Supreme Court, U.S.
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No. 00-1316

IN THE

Supreme Court of the United States

FRANKLIN RODRIGUEZ DELGADO, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DEAD SEA BROMINE COMPANY LTD., BROMINE COMPOUNDS LTD., AND AMERIBROM, INC.

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QUESTION PRESENTED

The first question presented as set forth in the Petition For A Writ of Certiorari should be stated as follows:

> 1. Whether Section 1603(b)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C.§ 1603(b)(2), which provides, in pertinent part, that an "agency or instrumentality of a foreign state" means "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state," requires direct ownership by the foreign state, or whether an entity that is majority owned by the state through one or more tiered subsidiary entities may be an "agency or instrumentality" within the meaning of the Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Respondent Dead Sea Bromine Company Ltd. is a third-party defendant in each case consolidated below. Respondent Bromine Compounds Ltd. is a third-party defendant in *Ramon Rodriguez Rodriguez, et al. v. Shell Oil Co., et al.* and a fourth-party defendant in *Jorge Colindres Carcamo, et al. v. Shell Oil Co., et al.* Respondent Ameribrom, Inc. is a third-party defendant in *Delgado, et al. v. Shell Oil Co., et al.*; *Jorge Colindres Carcamo, et al. v. Shell Oil Co., et al.*; *Juan Ramon Valdez, et al. v. Shell Oil Co., et al.*; and *Isae Carcamo v. Dow Chemical Co., et al.*

Bromine Compounds Ltd. and Ameribrom, Inc. are wholly owned subsidiaries of Dead Sea Bromine Company Ltd. Dead Sea Bromine Company Ltd. is a wholly owned subsidiary of Israel Chemicals Limited, a corporation organized under the laws of Israel that has issued shares to the public.

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Dead Sea Bromine Company Ltd. ("Dead Sea Bromine"), Bromine Compounds Ltd. ("BCL") and Ameribrom, Inc. (collectively, "Dead Sea") respectfully submit this brief in opposition to the Petition For A Writ Of Certiorari ("Petition") in this case.

COUNTERSTATEMENT OF THE CASE

A brief counterstatement is required to place the issues before this Court in proper perspective. A more complete recitation of the complex history of these cases is presented in the Counterstatement in the Brief In Opposition to A Writ of Certiorari of respondents Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company and Standard Fruit and Steamship Co. (collectively, the "Dole Respondents").

Plaintiffs filed these related cases in various Texas state courts. On receipt of a pleading naming it as a third-party defendant, Dead Sea Bromine[1] removed each case to the appropriate United States District Court pursuant to 28 U.S.C. § 1441(d). This provision is a part of the Foreign Sovereign Immunities Act ("FSIA" or "Act"), codified primarily at 28 U.S.C. §§ 1602-11, which authorizes any agency or instrumentality of a foreign state to remove claims asserted against it. The notices of removal asserted that Dead Sea Bromine was an agency or instrumentality of the State of Israel because the State had a majority ownership interest

1. BCL joined Dead Sea Bromine in removing *Ramon Rodriguez Rodriguez, et al. v. Shell Oil Company, et al.* For ease of reference, this brief refers only to Dead Sea Bromine's removals and status under the FSIA. The facts regarding ownership of BCL, a subsidiary of Dead Sea Bromine, and its FSIA status are in all material respects the same.

in Dead Sea Bromine during the relevant time period. *See* 28 U.S.C. § 1603(b)(2) (an "agency or instrumentality" includes an entity "a majority of whose shares or other ownership interest is owned by a foreign state").[2]

The FSIA was enacted in 1976 to establish "standards governing claims of immunity in every civil action against a foreign state, its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Entities to be accorded foreign sovereign status are defined to include the foreign sovereign, its political subdivisions and its agencies or instrumentalities. 28 U.S.C. § 1603(a). Although the Act defines broadly the entities accorded foreign sovereign status, it excepts certain commercial and other matters from sovereign immunity from suit, *id.* § 1605(a), and as to those matters, provides for federal jurisdiction and a non-jury trial. *Id.* §§ 1330(a), 1441(d).

The FSIA issue presented in these cases was whether the State of Israel held a "majority . . . ownership interest" in Dead Sea Bromine. *Id.* § 1603(b)(2). The issue arose because Israel's majority ownership of Dead Sea Bromine was held through one or more intermediate corporate entities. Although the precise ownership structure changed over time, the Fifth Circuit below correctly summarized the facts as they existed at one relevant point: "the State of Israel owns

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2. Dead Sea Bromine and BCL also contend that each was an "organ" of the State of Israel and entitled to "agency or instrumentality" status on that ground as well. *See* 28 U.S.C. § 1603(b)(2) (defining "agency or instrumentality" to include an "organ of a foreign state"). The courts did not reach this issue below, as they upheld the companies' claim to "agency or instrumentality" status under the majority ownership prong of § 1603(b)(2).

75.3% of Israel Chemicals Limited, an entity which owns 88.2% of Dead Sea Works Limited, which in turn owns 100% of Dead Sea [Bromine]." Petition Appendix 22. Both the district court and Fifth Circuit held that by virtue of this ownership structure, the State of Israel held a "majority . . . ownership interest" in Dead Sea Bromine within the meaning of the Act. Dead Sea Bromine was thus held to be an "agency or instrumentality" of Israel under the FSIA. The Petition seeks review of this holding.

By presenting a selective recitation of the complex procedural history of these cases, the Petition strives to create the impression that Dead Sea colluded with the defendant corporations that "were ostensibly suing it," Petition at 7, and insinuates the existence of an untoward scheme to perpetuate a fictitious controversy in order to vest the federal courts with jurisdiction. Since the Petition does not seek Certiorari review of any aspect of these charges, no purpose would be served by refuting the allegations and insinuations in detail. *Cf.* Supreme Court Rule 15.2.

Very briefly, however, we would note that the United States Court of Appeals for the Fifth Circuit and the federal district court below specifically rejected every argument presented by Petitioners in support of such contentions, including arguments that Dead Sea had been fraudulently joined in the actions and arguments that there is no case or controversy between the defendants and Dead Sea by virtue of Petitioners' disclaimers in their pleadings or the so-called "cap agreements." *See* Petition Appendix at 17, 27-37, 84-87. We would further note that Dead Sea Bromine moved in the district court to dismiss the claims against it on grounds of sovereign immunity, extensively briefed the issue (in active coordination with Petitioners' counsel) and waived

its claim to immunity (but not its claim to sovereign status) only months later, after the district court decided to allow Dead Sea to be subjected to extensive and costly discovery on facts pertinent to the immunity defense. Accordingly, Petitioners' suggestion that Dead Sea Bromine waived its claim to immunity *in order to secure federal jurisdiction* is simply untrue. Moreover, Dead Sea subsequently moved (again, in active coordination with Petitioners' counsel) to dismiss all third- and fourth-party claims against it based on Petitioners' disclaimers in their pleadings as to injury resulting from Dead Sea's product. The district court never reached this issue, because it ruled that it would consider those arguments only after resolving the jurisdictional issue and addressing defendants' forum *non conveniens* motion. *See* Petition Appendix at 107-08.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY THE WRIT BECAUSE THE FIFTH CIRCUIT'S DECISION ON THE FSIA ISSUE DOES NOT WARRANT REVIEW

The Fifth Circuit correctly decided the FSIA issue as to which this Court's review is sought. *See infra* Point I.A. Contrary to Petitioners' principal argument for Certiorari review, the Fifth Circuit's decision does not create a split with the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.) ("*Gates*"), *cert. denied sub nom. Fletcher's Fine Foods, Ltd. v. Gates*, 516 U.S. 869 (1995). The facts and holding of *Gates* are materially distinguishable from this case, and the question whether the Ninth Circuit would interpret *Gates* in a manner inconsistent

with the result reached by the Fifth Circuit below is currently pending before the Ninth Circuit in an appeal from *Patrickson, et al. v. Dole Food Co., et al.*, No. 97-01516 HG (D. Haw. Sept. 9, 1998), *appeal pending*, Nos. 99-16524 & 99-16770 (9th Cir.). *See infra* Point I.B. Although several district courts have indicated that they perceive a split between the Ninth Circuit's decision in *Gates* and one aspect of the Seventh Circuit's interpretation of the FSIA in *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 939-41 (7th Cir. 1996) ("*Air Crash*"), the specific FSIA issue as to which the Ninth and Seventh Circuits appear to disagree is not presented by Dead Sea Bromine's claim to FSIA status before the district court and the Fifth Circuit below. *See infra* Point I.C. Thus, the Fifth Circuit's decision neither creates a Circuit split nor provides a propitious opportunity to resolve one.

A. The Fifth Circuit's Decision Below Correctly Decided that the State of Israel Held a "Majority . . . Ownership Interest" in Dead Sea Bromine

The FSIA provides, in relevant part, that an "agency or instrumentality" is an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2). The plain language of that statute makes no reference to any requirement that the "ownership interest" be "direct." To the contrary, § 1603(b)(2) requires only that the foreign state have a "majority . . . ownership interest" in the entity. Petitioners' contention that the foreign state must *directly* own a majority of the shares of the entity claiming status as an "agency or instrumentality" would add an additional, substantive requirement to the statutory language. There is no basis to do so, and the Fifth Circuit below so held. *See* Petition Appendix at 22-23.

The word "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* at 729 (5th Ed. 1979). "More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, *but less than title*." *Id.* (emphasis added). Thus, the fact that the State of Israel did not have direct title to the shares of Dead Sea Bromine is irrelevant: the State held a majority ownership "interest" in Dead Sea Bromine by owning its parent companies.

The voluminous record in these cases includes affidavit and deposition testimony from Dead Sea executives; business records of Dead Sea Bromine and BCL; the Dead Sea Concession and Sub-Concession, which are licenses granted by Israel's national legislative body, the Knesset, pursuant to which Dead Sea Bromine and related entities enjoy an exclusive right to exploit the mineral wealth of the Dead Sea; and Israel's Government Companies Law, a statute that applies to Government-owned subsidiary companies such as Dead Sea Bromine and BCL. These evidentiary and legal materials establish the controlling, majority ownership interest that the State of Israel held in Dead Sea Bromine and BCL. The State's ownership interest in Dead Sea Bromine gave the State the right to receive Dead Sea Bromine's profits; to approve its capital structure or any decision to privatize it; to appoint its management; to approve the appointment of its directors, legal advisors and accountants; to approve its budgets and business; and to control its affairs in numerous other respects.[3] Clearly, on

3. The most complete evidentiary record was compiled in *Ramon Rodriguez Rodriguez, et al. v. Shell Oil Co., et al.*; the most complete description of the nature of Israel's ownership interest in Dead Sea Bromine and BCL may be found in Dead Sea's briefs to the Fifth Circuit in that appeal.

these facts the Fifth Circuit was correct in holding that the State held a controlling, majority ownership "interest" in Dead Sea Bromine. *See Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F. Supp. 1143, 1150 (D.N.J. 1991) (foreign state has majority "ownership interest" in subsidiary of state-owned corporation), *aff'd*, 958 F.2d 365 (3d Cir. 1992).

Under Israeli law, by virtue of owning Dead Sea Bromine's parent corporations, the State of Israel possessed control over Dead Sea Bromine and BCL far greater than that which shareholders of a corporate parent would have over a corporation's subsidiary under American law. Indeed, as a result of its ownership interest, the State of Israel had more control over Dead Sea Bromine under Israeli law than a majority shareholder in the United States would have over a corporation in which it *directly* held a majority stake. Plainly then, the State of Israel held a "majority . . . ownership interest" in Dead Sea Bromine.

B. The Fifth Circuit's Decision Below Does Not Create a Circuit Split with the Ninth Circuit Because *Gates* Did Not Involve Entities in which the Canadian Government Had Any Ownership Interest And Therefore Did Not Address the Issue Whether a Foreign State Holds a "Majority . . . Ownership Interest" in a Subsidiary of a State-Owned Company

Petitioners' contention that there is a conflict between the Fifth Circuit's decision below and the Ninth Circuit's decision in *Gates* is grounded in a fundamental misstatement of the facts and holding of *Gates*. The Petition grievously errs in asserting that the defendants in *Gates* "included several entities ultimately owned by a Canadian government

body." Petition at 14. In fact, the defendants in *Gates* were not owned by any Canadian government body. Accordingly, *Gates* could not have, and did not, address the circumstances under which a foreign sovereign holds a "majority . . . ownership interest." The foreign sovereign in *Gates* did not hold any ownership interest whatsoever — direct or indirect — in any of the *Gates* defendants.

Gates involved two defendants: (i) Alberta Pork Producers Development Corp. ("Alberta Pork") and (ii) its wholly owned subsidiary, Fletcher's Fine Foods ("FFF"). The Ninth Circuit held that Alberta Pork, which had been created as a marketing board for private hog producers, was an *organ* of the Province of Alberta, and therefore was an "agency or instrumentality" under the first disjunctive element of § 1603(b)(2). 54 F.3d at 1461. Neither Canada nor its political subdivision, the Province of Alberta, had any ownership interest, direct or indirect, in Alberta Pork. As a consequence, the Ninth Circuit analyzed only whether Alberta Pork was an organ. Majority ownership of Alberta Pork was not discussed.

The Ninth Circuit then addressed FFF's contention that it too was an "agency or instrumentality" of a foreign state. FFF did not claim that it was an organ of a foreign state. Nor did FFF claim that it was owned, directly or indirectly, by Canada or the Province of Alberta. Indeed, FFF could not have made such an argument because FFF was "not owned either directly or indirectly by the federal government of Canada, the provincial government of Alberta, or by any political subdivision of either of those governments." *See Respondents' Opposition To Petition For Writ Of Certiorari, Fletcher's Fine Foods, Ltd. v. Gates*, No. 95-175, at 13 (U.S. Aug. 30, 1995). FFF was a corporation

wholly owned by Alberta Pork, *Gates*, 54 F.3d at 1462, and neither Canada nor the Province of Alberta had any direct or indirect ownership interest in Alberta Pork.

FFF argued that since it was majority owned by Alberta Pork, which was an "agency or instrumentality" and was therefore a "foreign state" under § 1603(a), FFF also qualified as an agency or instrumentality of a foreign state. In making this argument, FFF relied on the provisions of 28 U.S.C. § 1603(a), which provides that " 'foreign state' . . . includes . . . an agency or instrumentality of a foreign state as defined in sub-section (b)." In other words, FFF attempted to invoke the arguably recursive interrelationship of §§ 1603(a) and 1603(b) whereby any entity owned by an agency or instrumentality of a foreign state would itself claim to be an agency or instrumentality by virtue of its parent corporation's status as a "foreign state" under § 1603(a). (This "recursive" or "iterative" interpretation of the FSIA is discussed *infra* Point I.C.) The Ninth Circuit rejected FFF's attempt to interpret the statute in this "iterative" fashion.

Gates dealt only with the "organ" prong of § 1603(b)(2). As neither Alberta Pork nor FFF was owned, directly or indirectly, by Canada or the Province of Alberta, the majority ownership prong of § 1603(b)(2) was not in issue. Thus, the Ninth Circuit in *Gates* never considered or decided whether indirect majority ownership of an entity by a foreign sovereign is sufficient under the ownership prong of § 1603(b)(2), and *Gates* is inapposite to the issues in this case. *Gates* held that FFF did not become an "agency or instrumentality" of a foreign state by virtue of being wholly owned by an "organ" of the state. *Gates* stands for the limited proposition that an agency or instrumentality must either be

an organ of a foreign state (or its political subdivision) *or* an entity majority owned by the foreign state (or its political subdivision). Unlike Dead Sea Bromine, FFF was neither.

As *Gates* did not address the ownership prong of § 1603(b)(2), the supposed conflict between the decision of the Fifth Circuit below and *Gates*, which constitutes the Petition's principal argument for granting Certiorari review, simply does not exist. Indeed, Petitioners' interpretation of *Gates* cannot be reconciled with three earlier Ninth Circuit decisions in which the Ninth Circuit accepted that a foreign state's ownership of a corporation through a tiered subsidiary satisfied FSIA requirements. *See Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) (FSIA subject matter jurisdiction existed in a suit filed against a second tier subsidiary of the Province of Quebec); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1406-7, 1411-12 (9th Cir. 1989) (FSIA subject matter jurisdiction existed in a suit filed against a subsidiary of a corporation 81% of whose shares were owned by Republic of Finland); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795 n.2, 796-800 (9th Cir. 1989) (Aer Lingus, a corporation owned by the Republic of Ireland, and its wholly owned subsidiary both accepted as agencies or instrumentalities of the Republic). *Gates* did not even mention, let alone overrule, these prior decisions, and none of them is at variance from the Fifth Circuit's decision below.

Petitioners also cite to *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996) ("*Corporacion Mexicana*"), as support for their "Circuit split" argument. In that case, the Ninth Circuit found Pemex-Refining, a second-tier government subsidiary, to be an organ of a foreign state. 89 F.3d at 655. The Ninth Circuit did not address whether the lower tier subsidiary was

an agency or instrumentality of a foreign state through ownership; nor did it discuss the three prior Ninth Circuit cases that recognize tiered ownership as a majority ownership interest under the FSIA. Accordingly, that case is also inapposite here.[4]

Finally, Petitioners cite the district court's decision in *Patrickson, et al. v. Dole Food Co., et al.*, No. 97-01516 HG (D. Haw. Sept. 9, 1998), as support for their "Circuit split" argument. Plaintiffs in *Patrickson* claim to have been injured by exposure to the same pesticide as is at issue in this case while working on banana plantations in various foreign

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4. In citing *Corporacion Mexicana*, Petitioners rely on a single, ambiguous sentence in the Ninth Circuit's opinion, which characterized *Gates* as holding that "the ownership test of § 1603(b)(2) applied only to the first tier of ownership: an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." *Corporacion Mexicana*, 89 F.3d at 655. To the extent this *dictum* implied that *Gates* made any holding with respect to a foreign sovereign's ownership through a tiered subsidiary, that characterization would be manifest error: as we have seen, *Gates* had no occasion to address whether Canada or the Province of Alberta had a "majority" ownership "interest" in the subsidiary at issue in that case (FFF), because neither Canada nor the Province had any ownership interest in either FFF or its parent, Alberta Pork. Alternatively, the *dictum* may be interpreted as rejecting the potentially recursive relationship between §§ 1603(a) and 1603(b), and stating, as *Gates* did hold, that a "foreign state or a political subdivision thereof" does not have a majority ownership interest in an entity if there is no majority ownership at the "first tier of ownership." Whatever the meaning of the *dictum* quoted above, the holding of *Corporacion Mexicana* — that the entity in that case was an "organ" of the Mexican Government — provides no support for Petitioner's "Circuit split" contention.

countries. They sued the same defendants as in this case in the state courts of Hawaii and, as in this case, Dead Sea Bromine and BCL were impleaded and the cases removed to federal court. The district court in *Patrickson* interpreted *Gates* as weighing against Dead Sea Bromine's argument that it is an agency or instrumentality under the FSIA. *See* Petition Appendix at 191-92. At the same time, the district court noted that the facts presented by Dead Sea Bromine's claim to FSIA status "differ from those in *Gates*" for the reasons explained above. *Id.* at 191. Petitioners quite notably fail to inform this Court that the district court's decision in *Patrickson* has been appealed to the Ninth Circuit, which heard oral argument on August 9, 2000. Thus, the very question whether the Ninth Circuit's interpretation of the statute in fact conflicts with that of the courts below is currently pending.

C. Although There Appears To Be a Conflict Between the Seventh Circuit's "Iterative" Approach in *Air Crash* and the Ninth Circuit's Rejection of that Approach in *Gates*, the Cases Consolidated Below Do Not Turn on that Issue and Therefore Are Not the Appropriate Vehicle to Resolve that Conflict

In its decision in *Air Crash*, the Seventh Circuit engaged in a lengthy discussion of the definition of "agency or instrumentality" in 28 U.S.C. § 1603(b)(2) and its relationship with the definition of "foreign state" in § 1603(a). In one passage, the Seventh Circuit interpreted the FSIA to adopt the "recursive" or "iterative" interpretation of the definitions of "foreign state" and "agency or instrumentality" discussed in Point I.B, *supra*. 96 F.3d 939-40. At a later point, the court, like the Fifth Circuit in the decision below, stated simply that the Act does not require direct ownership. *Id.* at 941.

Under the "recursive" or "iterative" interpretation of the FSIA, a company that is majority owned by a foreign state is, thereby, its "agency or instrumentality" (pursuant to 28 U.S.C. § 1603(b)(2), defining "agency or instrumentality"), and, accordingly, is itself a "foreign state" (pursuant to § 1603(a), defining "foreign state" to include an "agency or instrumentality"). Since the majority-owned company is itself a "foreign state", *its* subsidiary is itself "majority owned" by a "foreign state" and therefore qualifies as an "agency or instrumentality" pursuant to § 1603(b) and, as well, a "foreign state" pursuant to § 1603(a). *Gates* specifically rejected this "iterative" approach,[5] and, in so doing, interpreted the Act differently than the Seventh Circuit did in the portion of the *Air Crash* opinion adopting that approach. This issue, however, is not relevant to the instant proceeding.

The Fifth Circuit decision below did not endorse (or even discuss) the "iterative" approach approved by the Seventh Circuit in *Air Crash*. Nor is the "iterative" interpretation required to reach the conclusion that Dead Sea Bromine is an agency or instrumentality of Israel. Rather, the Fifth

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5. The Ninth Circuit's opinion in *Gates* expressed concern that under the "iterative" approach, an entity might be deemed an "agency or instrumentality" even though it was not majority owned by the foreign sovereign. For example, suppose the Netherlands owns 60% of a Company (C_1), which owns 60% of another Company (C_2): the iterative approach would hold that C_1 is an "agency or instrumentality" and therefore a "foreign state"; C_2 is therefore majority owned by a "foreign state" (*i.e.*, C_1) and becomes an "agency or instrumentality," even though the Netherlands only has a 36% ownership interest in C_2 (.6 x .6 = .36). Although the Fifth Circuit very clearly did not rely upon such an analysis, it should be emphasized that at all relevant times the State of Israel's percentage ownership interest in Dead Sea Bromine exceeded 50%, and therefore constituted a majority ownership interest.

Circuit's decision was grounded on the straightforward argument presented in Point I.A., *supra*, that the State of Israel held a "majority . . . ownership interest" in Dead Sea Bromine during the relevant time period, and that there is no basis to read into the statute a requirement that the ownership interest be "direct." Petition Appendix at 22-23. Notably, although the Fifth Circuit did cite *Air Crash*, it did not reference the passage in which the Seventh Circuit approved the "iterative" interpretation of the relationship between § 1603(a) and § 1603(b)(2), 96 F.3d at 939-40, but referenced only the page at which the court concluded that the FSIA "does not expressly require direct ownership." *Air Crash*, 96 F.3d at 941.

Under the Fifth Circuit's approach, Dead Sea Bromine is an "agency or instrumentality" because the State of Israel held a majority ownership interest in it during the relevant time period. *See supra* Point I.A. Although Dead Sea Bromine would also be an "agency or instrumentality" under the "iterative" approach endorsed in *Air Crash* and rejected in *Gates*, the Fifth Circuit did not rely on that approach. Any conflict between *Gates* and *Air Crash* as to the "iterative" approach is irrelevant to whether the Fifth Circuit's judgement should be affirmed. It follows that the extraordinarily complex cases resolved by the Fifth Circuit's decision do not present the appropriate opportunity to resolve any conflict that may exist between *Gates* and *Air Crash*.

II.

THE COURT SHOULD DENY THE WRIT BECAUSE DEAD SEA BROMINE'S NOTICE OF REMOVAL WAS PROPER

Dead Sea Bromine will not, at this juncture, address in detail Petitioners' contention that it was improperly joined as a third-party defendant in certain of the cases below. That issue is being fully addressed in the Dole Respondents' Brief in Opposition. We note simply that whether Dead Sea Bromine was properly joined in the state court proceedings is irrelevant to whether it properly removed the cases to federal court. In each case, Dead Sea Bromine removed the suit to federal court after having been named as a third-party defendant in a signed and filed pleading delivered to its litigation counsel. *See* 28 U.S.C. § 1446(b) ("notice of removal . . . shall be filed . . . after the receipt . . . *through service or otherwise*, of a copy of the . . . pleading" (emphasis added)). The possibility that these third-party complaints might eventually have been stricken in subsequent state court motion practice did not render Dead Sea Bromine's notice of removal improper. Petitioners cite no authority for their implicit assertion that Dead Sea Bromine was required, upon receipt of the third-party complaints, to refrain from filing a notice of removal and instead file a motion to dismiss in *state* court. On the contrary, as an agency or instrumentality of the State of Israel under the FSIA, Dead Sea Bromine had a right under the FSIA to seek dismissal in *federal* court of any and all claims asserted against it, including those that may have been procedurally improper. Thus, Dead Sea Bromine appropriately asserted a right to a federal forum for the adjudication of the claims asserted against it. Whether those claims were properly or improperly asserted is irrelevant to the propriety of Dead Sea Bromine's removal of the cases to federal court under the FSIA.

CONCLUSION

The issues raised in the Petition do not merit review. No conflict exists between any Circuit Court as to the specific issue on which the Fifth Circuit ruled below. The cases consolidated below are not the appropriate vehicle to resolve any purported conflict between the Ninth and Seventh Circuits as to the inter-relationship between Sections 1603(a) and 1603(b)(2) of the FSIA, because that issue is not presented by the Fifth Circuit's ruling below.

Respectfully submitted,

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